



Commonwealth of Massachusetts State Ethics Commission

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CONFLICT OF INTEREST OPINION EC-COI-93-1

FACTS:

You are the Chief of a municipal fire department in the Commonwealth. Two trade shows are held in Massachusetts for Fire Chiefs and are sponsored by the New England Association of Fire Chiefs, Inc. and the New England Division of the International Association of Fire Chiefs. These shows include over 100 vendor companies who exhibit fire apparatus, fire fighting equipment, emergency medical equipment, fire dispatching equipment and ambulances.

After a community receives delivery of a piece of new or refurbished equipment, the vendor may request that the equipment be displayed at a trade show. It is common practice for a Fire Chief to transport the equipment to the show and to use on-duty firefighters who remain at the show with the equipment. The vendor does not provide travel expenses or reimbursement for this service.

QUESTION:

Does G.L. c. 268A permit firefighters to lend official resources to a vendor for sales purposes or to provide an endorsement of a particular vendor?

ANSWER:

Firefighters may not use official resources (such as equipment and personnel) to promote vendor sales of a product, unless the use is authorized by a bylaw, or is an explicit contract condition, or the municipality is provided with reasonable reimbursement. Firefighters may not use their official position or title to endorse a product on behalf of a vendor.

DISCUSSION:

As a Fire Chief, you are a municipal employee for purposes of the conflict law. G.L. c. 268A, §23(b)(2) prohibits a municipal employee from knowingly, or with reason to know, using his official position to secure for himself or others an unwarranted privilege of substantial value^{1/} which is not available to similarly situated individuals. The Ethics Commission has consistently interpreted this section to forbid public officials from using public resources to further private interests. *See Public Enforcement Letter 92-3* (public employee who used public resources to assist private non-profit organization violated §23(b)(2)); *EC-COI-93-6*; *92-28*; *92-12*; *Public Enforcement Letter 89-4*; *In re Buckley*, 1983 SEC 157. You will be using your official position to secure an unwarranted privilege for the vendor if you permit a private vendor, for sales purposes, to utilize fire department equipment and personnel at no charge.

We note that §23(b)(2) will not be violated if the Town, in its purchase contract with the vendor, expressly agrees to provide the equipment for display purposes. *See EC-COI-87-37* (state contract which included vendor discount to all state employees did not violate §23); *compare EC-COI-88-5* (contract conditions are not adequate for purposes of compliance with G.L. c. 268A, §3). Presumably, the contract price will reflect this provision. Further, if the vendor agrees to reimburse the municipality for the use of official resources and personnel, including a reasonable rental for use, the vendor will not receive an unwarranted privilege. Similarly, if the municipality passes a bylaw or ordinance permitting such a practice, §23 will not be violated. *See EC-COI-91-13*; *Public Enforcement Letter 90-4*.^{2/} Finally, if the trade show was arranged so that the exhibit of

municipal equipment was in a separate area from the vendor booths and exhibits, we would not have the same concerns under §23(b)(2).

Section 23(b)(2) also prohibits a public employee from using his official title or position to endorse a private commercial product. In applying §23(b)(2) to an endorsement by a public employee, the Commission considers whether the activity or conduct in question exceeds the scope of a public employee's official duties, "and whether the activity or conduct benefits a private or personal, as distinct from a public interest." *EC-COI-84-127*; 83-82. In *EC-COI-84-127*, the Commission concluded that a judge could not use his position in a paid advertisement for an oil company because the advertisement was not within the official duties of his office and the use of his name clearly benefitted a private interest. The Commission stated

the lending of the prestige of your office to the Corporation for the purpose of selling its products constitutes an unwarranted privilege to the Corporation. The appearance of your name and identity in a commercial might, in the eyes of some viewers, imbue the corporation's product with a degree of credibility it might not otherwise have.

The Commission's position is consistent with regulations recently adopted by the federal Office of Government Ethics, entitled "Standards of Ethical Conduct for Employees of the Executive Branch." 5 CFR part 2635. See *EC-COI-92-28* (Commission used these regulations for guidance in interpreting §23 within the context of private solicitation by a public official); 87-32 (looking to federal regulation for guidance in construing G.L. c. 268A). These regulations address the use of official position for private gain and fundraising by federal employees. Particularly, 5 CFR 2635.702(c) prohibits a federal employee from using or permitting the use of his Government position or title or any authority associated with his public office to endorse any product, service or enterprise except under certain limited circumstances.^{3/}

Therefore, §23(b)(2) will prohibit you from using your official title in an advertisement which promotes a vendor's products or from serving as a representative in a vendor's booth at the trade show.^{4/} This section will not prohibit you from responding to questions from your colleagues, speaking at a seminar concerning your experiences with a certain piece of equipment, or writing a letter of reference as required by another government agency's contract specifications. If you are asked to give a presentation you should take care that you do not provide an endorsement of a vendor or use your title and the prestige of your office to further the vendor's products.^{5/}

DATE AUTHORIZED: January 26, 1993

^{1/}The Commission has defined "substantial value" to be \$50 or more. See *Commonwealth v. Famigletti*, 4 Mass. App. 584, 587 (1976); *Commission Advisory No. 8*.

^{2/}If the use of official resources is warranted, issues may develop under §23(b)(3). Section 23(b)(3) provides that a municipal employee may not act in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that any person can improperly influence him or unduly enjoy his favor in the performance of his official duties or that he is likely to act or fail to act as a result of kinship, rank, or position of any person. *EC-COI-89-16* (past friendship relationship); 88-15 (private dealings with development company); 85-77 (private business). You may wish to file a full written disclosure with your appointing authority prior to participating in a matter affecting a vendor whom you are assisting. See *EC-COI-91-3*; 90-2; 89-19.

^{3/}For example, an endorsement may be permissible if the agency's statutory mission includes assisting in the promotion of a product or service, such as the Department of Commerce, which is charged with assisting the export activities of United States companies, promoting United States products abroad. The other narrow exemption would permit an official, such as the Director of the Environmental Protection Agency, to send a letter to a company stating that the company was in compliance with EPA regulations. 5 CFR 2635.702(c), examples 2, 3.

^{4/}This prohibition on endorsements applies to you even if the use of official resources, as discussed above, is warranted.

^{5/}These examples are intended to be representative of situations that you may encounter and do not constitute an all-inclusive list. You are advised to contact the Commission for further advice if you question how §23 applies in a particular situation.